IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TRIANTAFYLLOS TAFAS, Plaintiff, v. JON W. DUDAS, et al., Defendants.	)	Civil Action No. 1:07cv846(L) (JCC/TRJ)

CONSOLIDATED WITH

SMITHKLINE BEECHAM CORPORATION, et al., Plaintiffs, v. JON W. DUDAS, et al., Defendants.	)	Civil Action No. 1:07cv1008 (JCC/TRJ)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF TRIANTAFYLLOS TAFAS'S MOTION FOR RECONSIDERATION

INTRODUCTION

After countless briefs, three hearings, and two memorandum opinions, Plaintiff Triantafyllos Tafas asks this Court to reconsider the very same discovery issues that it has already twice rejected, based on the same arguments. The irony of Tafas's request for reconsideration is remarkable. This Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., case is about whether Defendants Jon W. Dudas and the United States Patent and Trademark Office (collectively "the USPTO" or "the Office") acted in an unlawful or arbitrary

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and capricious manner in enacting procedural regulations that are designed, in large part, to redress the kind of repetitive filings that Tafas's most recent motion exemplifies. Just as unconditioned continuing applications and requests for continued examination strain the work of the Office and prevent it from examining new patent applications, this motion requires the Court to rehash old, settled issues rather than moving on to the new matters filling its docket.

Tafas has provided no meaningful justification for the Court to reconsider its extensive and well-reasoned opinion affirming Magistrate Judge Jones's decision to deny Tafas's requests for discovery beyond the administrative record and a privilege log. Tafas v. Dudas, — F. Supp. 2d —, 2008 WL 112043 (E.D. Va. Jan. 9, 2008). Tafas now reargues the same points raised in his Objections and cites no authority or evidence that was unavailable at the time he filed those Objections. The Court should deny the motion for reconsideration, which is, in any event, moot, and move on to the new matters on its docket, including the parties' pending motions for summary judgment.

ARGUMENT[1]

I. TAFAS'S MOTION FOR RECONSIDERATION IS MOOT

Tafas has rendered his own Motion for Reconsideration moot by failing to submit an affidavit pursuant to Federal Rule of Civil Procedure 56(f) in response to the USPTO's summary judgment motion. Federal Rule of Civil Procedure 56(f) provides that "[I]f a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may," *inter alia,* "order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken." Fed. R. Civ. P. 56(f)(2). The Fourth Circuit and other courts take the requirement of filing a Rule 56(f) affidavit seriously. See, e.g., Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 961 (4th Cir.1996) (warning that the court "place[s] great weight on the Rule 56(f) affidavit" and that "[a] reference to Rule 56(f) and the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(f) affidavit"). As the Fourth Circuit has frequently stated, "'[a] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit.'" Strag v. Board of Trustees, 55 F.3d 943, 953 (4th Cir. 1995) (quoting Nguyen v. CNA Corp., 44 F.3d 234, 242 (4th Cir. 1995)); see also Paddingon Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994) ("A reference to Rule 56(f) and to the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(f) affidavit . . . and the failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate").

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[1] Recognizing the Court's familiarity with the background of the discovery issues in this case see Tafas, 2008 WL 112043, at *1-2, the USPTO will not review this history. For another recitation of the relevant background that brings the history more up to date, the USPTO respectfully refers the Court to the Memorandum in Support of Defendants' Motion to Strike, Dkt. No. 250, at 2-4.

Here, Tafas has neither filed a Rule 56(f) affidavit in response to the USPTO's summary judgment motion, nor has he even argued that discovery is necessary to defeat the USPTO's summary judgment or to prevail on his own summary judgment motion. He simply has made no showing that there are specific facts that he needs from discovery before this Court can adjudicate the parties' cross-motions for summary judgment. Under these circumstances, Tafas's Motion for Reconsideration is moot, for the Court need not order discovery or require the

USPTO to create a privilege log when the parties' fully-briefed cross-motions for summary judgment can be decided without them.[2]

II. RECONSIDERATION IS INAPPROPRIATE

A. Tafas Faces a Heavy Burden to Justify Reconsideration, Particularly In Seeking Reconsideration of the Denial of Rule 72 Objections

While it is true that this Court may, in its discretion, reconsider prior interlocutory decisions in a case that has not yet gone to final judgment, Am. Canoe Ass'n v. Murphy Farms, 326 F.3d 505, 515 (4th Cir.2003); Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1473 (4th Cir.1991), Tafas ignores this Court's admonition that "[a] motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court 'rethink what the Court ha[s] already thought through – rightly or wrongly.'" Clark v. Va. Bd. of Bar Exam'rs, 861 F. Supp. 512, 518 (E.D.Va.1994) (Cacheris, C.J.) (quoting Above the Belt, Inc. v.

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[2] Tafas's failure to identify any particularized need for discovery further shows that he cannot overcome Federal Rule 26(b)(2)(C)(iii), which provides that the "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that (iii) the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C)(iii). Here, Tafas has shown no need or "likely benefit" from the discovery he seeks, whereas it would be extraordinarily burdensome to the USPTO to contend with discovery and produce a privilege log concerning a rulemaking that lasted more than two years, involved dozens of agency employees, and tens of thousands of pages of documents. See Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 372 (D.D.C. 2007) ("[I]t must be recalled that production of the materials Blue Ocean seeks would transform the process of judicial review of administrative decisions greatly even if limited to specific instances of claimed deficiencies in the administrative record. The agency would have to collect all internal communications among agency officials pertaining to the claimed deficiency, catalogue them, and claim the deliberative process privilege where appropriate, which may be as to all of them. . . . Creating such a new burden on the agency, the parties and the court by forcing production of even a limited number of interagency deliberative documents requires a clear command from the court of appeals, particularly in light of the unequivocal statement by that court that such materials are not a part of the administrative record when an agency decision is challenged as arbitrary and capricious.").

Mel Bohannan Roofing, Inc., 99 F.R.D 99, 101 (E.D.Va.1983); accord Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa.1993).

Motions for reconsideration "serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc., 762 F.2d 557, 561 (7th Cir.1985); accord Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985); Clark, 861 F. Supp. at 518. They should not be granted where they "present[] no arguments that had not already been raised." Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir.1988).

The cases Tafas cites illustrate well the appropriate uses of a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b), in contrast with Tafas's use of his motion. In Konan v. Sengel, No. 1:06cv175(JCC), 2006 WL 3304214 (E.D. Va. 2006) (Cacheris, J.), this Court reconsidered an earlier interlocutory decision denying a motion to dismiss which had been based on a claim that the plaintiff was collaterally estopped by a prior decision of the Virginia Supreme Court. Id. at *1. The Court granted reconsideration because the defendant had failed to submit the decision of the Virginia Supreme Court on which the motion to dismiss was based and it had thus been unavailable for the Court to review. Id. at *2. Similarly, in DeShazo v. Smith, No. 1:05cv1046(JCC), 2006 WL 3424045 (E.D. Va. 2006) (Cacheris, J.), also relied on by Tafas, a State court receiver sought dismissal of claims against him arising from a dispute over the tax liability of a decedent's estate. This Court denied the Receiver's motion to dismiss because the State court had not entered an Order approving the relevant Report of the Receiver. Id. at *1. Following entry by the State court of such an Order *nunc pro tunc*, the Receiver sought reconsideration of his claim to quasi-judicial immunity. Because that State court Order had not been entered prior to this Court's original decision, this Court concluded that reconsideration was appropriate to consider the effect of the intervening *nunc pro tunc* Order. Id. at *2-3. Both decisions highlight the impropriety of Tafas's Motion for Reconsideration, which points to no intervening Order of another Court, as in DeShazo, or submits any formerly omitted but controlling decision, as in Konan. Tafas, by contrast, simply asks the Court to "rethink what it has already thought through."[3] Clark, 861 F. Supp. at 518.

Tafas further fails to acknowledge the posture of his Motion for Reconsideration relative to that of the cases he cites. Tafas asks this Court to reconsider a decision that denied Federal Rule Civil Procedure 72(a) objections to the ruling of a magistrate judge. The decision that this Court would have to reconsider was thus itself governed by a stringent standard of review: the "clearly erroneous or contrary to law" standard. Tafas, 2008 WL 112043, at *2. Tafas's burden, therefore, is to show that this Court made "manifest errors of law or fact," Publishers Res., 762 F.2d at 561, in determining that Magistrate Judge Jones's decision was not "clearly erroneous or contrary to law," Tafas, 2008 WL 112043, at *2. The posture of this case heightens his burden exponentially. Tafas's request for the Court to "rethink what it already thought through" clearly cannot meet this rigorous burden.

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[3] Tafas's reliance on M.S. v. Fairfax County School Board, 1:05CV1476 (JCC), 2006 WL 1390557 (E.D. Va. 2006) (Cacheris, J.), is equally unhelpful to him. There, the Court had dismissed two plaintiffs' claims of retaliation under the Americans with Disabilities Act. The Court denied reconsideration of one of the plaintiffs' claims, finding that "'[p]laintiff improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought through-rightly or wrongly.' Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D.Va.1983). In such circumstances, the Court will not grant a motion to reconsider." Id. at *3. To be sure, the Court also noted that it had "in the past, recognized the appropriateness of a motion to reconsider where the Court previously misunderstood a party or committed an error of apprehension," and reconsidered the claim by a second plaintiff due to an error of apprehension. Id. at * 4. Here, however, Tafas has identified nothing in this Court's characterization of his or the USPTO's contentions in its Memorandum Opinion that was incorrect. See Tafas, 2008 WL 112043, at *3, 5, & 6.

B. The Court Properly Apprehended the USPTO's Position that Deliberative Materials Are Not Part of the Administrative Record, and Properly Denied a Privilege Log for this Reason

Tafas first claims that "the Court plainly misapprehended that the USPTO was not claiming privilege with respect to excluded documents." Pl. Triantafyllos Tafas' Mem. of L. in Supp. of His Mot. for Reconsid. ("Tafas Mem."), Dkt. No. 245, at 9. In fact, the Court correctly apprehended the USPTO's position that because deliberative materials are not properly included in the administrative record in the first place, they need not be produced in discovery or enumerated in a privilege log. Tafas, 2008 WL 112043, at *11.

As the USPTO has consistently shown, deliberative materials do not belong in an administrative record because they are irrelevant to arbitrary and capricious review under the APA and would chill candid agency decision-making.[4] The USPTO clearly set out this argument in Defendants' Omnibus Memorandum in Opposition to Plaintiffs' Requests for Discovery Beyond the Administrative Record ("Omnibus Mem."), Dkt. No. 85, which it submitted to Magistrate Judge Jones:

> As the D.C. Circuit and other courts have long held, "internal memoranda made during the decisional process . . . are never included in the record." Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689, 693 (D.C. Cir. 1947) (emphasis added); In re Subpoena Duces Tecum, 156 F.3d at 1279 (D.C. Cir. 1998) ("Agency deliberations not part of the record are deemed immaterial."); see also Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999) (explaining that the deliberative process privilege covers all "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather

[4] These rationales apply equally to deliberative materials in adjudicatory- and rulemaking-based APA cases. Tafas's effort to distinguish some of the cases cited by this Court on the ground that they arise out of cases involving adjudications is thus unproductive. Tafas Mem. at 21-22; see, Ad Hoc Metals Coalition v. Whitman, 227 F. Supp. 2d 134, 142-43 (D.D.C. 2002) (holding that deliberative materials did not belong in the record of agency rulemaking).

> than the policy of the agency") (internal quotation marks omitted). There are at least two reasons deliberative process materials are excluded. First, such materials are irrelevant because, as noted above, the reasonableness of the agency's action is judged in accordance with its "stated reasons" since "the actual subjective motivation of agency decisionmakers is irrelevant as a matter of law" See In re Subpoena Duces Tecum, 156 F.3d at 1279. Second, requiring an agency to include deliberative materials in its administrative record would represent an "extraordinary intrusion" into the workings of an executive agency and would chill "uninhibited and frank" discussions. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc); Ad Hoc Metals Coalition, 227 F. Supp. 2d at 143 (noting that require agencies to turn over deliberative materials threatens to "hinder candid and creative exchanges regarding proposed decisions and alternatives, which might . . . lead to an overall decrease in the quality of decisions."). Internal memoranda, drafts, e-mails, and other such deliberative materials no more belong in an agency's administrative record than similar documents created by district court judges or their law clerks belong in a record on appeal. See San Luis Obispo Mothers, 789 F. 2d at 45 ("We think the analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court could not fully perform its functions.).

Omnibus Mem. at 6-7. In view of the abundant authority supporting the USPTO's position, much of which this Court cited approvingly in its Memorandum Opinion, see Tafas, 2008 WL 112043, at *4, *11, it is baffling how Tafas could now seek reconsideration on the ground that "[t]here is no precedent that would support the PTO's admitted withholding of documents and materials that were directly or indirectly considered by the decision-makers at the time of the decision under the mantra of 'deliberative materials.'" Tafas Mem. at 14. This is plainly incorrect.

Furthermore, it should come as no surprise that the same deliberative materials that do not belong in the administrative record because they are irrelevant to the Court's arbitrary or capricious review would also fall within the deliberative process, attorney-client, and work product privileges. See, e.g., Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1456-58 (1st Cir. 1992) (finding that documents that fall within the deliberative process privilege, attorney-client privilege, and attorney work product privilege did not belong in the administrative record). It is for this reason that USPTO counsel frequently referred in the parts of the hearings that Tafas quotes to documents being both privileged and not properly part of the administrative record. See, e.g., Tafas Mem. at 10 (quoting 11/16 Hearing Tr. at pp. 40-41) (MS. WETZLER: "[T]urning then to the question of deliberative materials. They are not part of the record. It's not simply that they are privileged, it is that they are not part of the record."); id. at 11 (quoting 11/27 Hearing Tr. at pp. 40-41) (MS. WETZLER: "[T]he USPTO has not withheld documents only because they are subject to the deliberative process privilege, though the withheld documents are subject to that privilege, among others, and their disclosure would represent an 'extraordinary intrusion' into the workings of an executive agency."). Tafas appears to believe that if a case involves privileged documents, a privilege log must be required, but he overlooks that this is an APA case in which the documents at issue are not only privileged, but also do not belong in the administrative record.

This Court was correct, therefore, when it concluded that "[a] complete administrative record, however, does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege." Tafas, 2008 WL 112043, at *4. It was further correct when, drawing on its first conclusion, it found that a privilege log should not be required because "these internal e-mails, correspondence, summaries, and drafts that Tafas seeks are not properly part of the administrative record in the first place." Id. at *11; accord Blue Ocean Inst., 503 F. Supp. at 371-72 (noting that it would be "unfair to criticize [the agency] for not claiming a privilege and filing a privilege log as to documents that it claims should not be in the administrative record in the first place").

Tafas argues that because the USPTO has never denied that deliberative materials – including attorney-client materials and work product – exist, a privilege log is required. See, e.g., Tafas Mem. at 12. But it is not a secret that such materials exist; all notice-and-comment rule-making involves consideration of the comments received, as well as making choices among alternatives, and that consideration will necessarily take written as well as oral form. Thus, in every rule-making there are deliberative materials which memorialize the advice received by the decision-makers, as well as, often, discussions among an agency's staff and counsel. Nonetheless, as this Court concluded, the law is clear that such deliberative materials are not properly part of the administrative record, and, therefore, no privilege log is required.

Tafas does not come forward with any controlling authority holding that deliberative materials are properly part of an administrative record – a failure that alone should doom his Motion for Reconsideration as no more than an effort to require the Court to "rethink what it has already thought through." Tafas relies on Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), but that case did not address whether deliberative materials belong in an administrative record and could not be more distinguishable from this case. There, the Supreme Court could not adequately conduct APA review because the agency had not produced any administrative record. Id. at 419. Instead, it relied solely on litigation affidavits that were "post hoc rationalizations" of the agency action. Id. (internal quotation marks omitted). This Court, by contrast, has before it a 127-page Federal Register notice and nearly 10,000-page record that amply explain the USPTO's decision to promulgate the Final Rules.

Tafas also analogizes this case to the three decades-old case of Tenneco Oil Co. v. Department of Energy, 475 F. Supp. 299 (D. Del. 1979), but that case predates critical appellate decisions establishing that deliberative materials are not properly part of an administrative record. See, e.g., In re Subpoena Duces Tecum, 156 F.3d at 1279 (D.C. Cir. 1998) ("Agency deliberations not part of the record are deemed immaterial."); Madison County Bldg. & Loan Ass'n v. Fed. Home Loan Bank Bd., 622 F.2d 393, 396 n.3 (8th Cir. 1980). Moreover, the Tenneco court held out the possibility that the agency would be able to assert deliberative process privilege over many materials, including "internal memoranda," but recognized that this was a "question[] the Court need not presently decide." Tenneco, 475 F. Supp. at 318-19.

Seeking to distinguish cases that support the USPTO's position and this Court's decision, Tafas cites, among others, Amfac Resorts, LLC v. United States Department of the Interior, 143 F. Supp. 2d 7 (D.D.C. 2001); however, he distorts the holding and reasoning of that case through selective quotation. There, the plaintiffs sought discovery outside the administrative record and the agency sought a protective order. Like this Court, Judge Lamberth concluded that to obtain discovery from an agency in an APA case, a party must overcome the standard presumption that the agency properly designated the Administrative Record. Id. at 12. And, like this Court, Judge Lamberth concluded that a party seeking discovery in an APA case must make a strong showing that the filed administrative record was incomplete to overcome that presumption. Id. Judge Lamberth then turned to considering what constitutes the administrative record. Tafas quotes part of that discussion, Tafas Mem. at 21, but neither quotes, nor acknowledges, the sentence concluding the paragraph, which states, "[h]owever, deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record." Amfac Resorts, 143 F. Supp. 2d at 12. Indeed, Judge Lamberth noted that "large categories of information are routinely excluded from the [administrative] record," and that the exclusion of those categories of information from the record did not render the record as filed incomplete. Id. at 13. As Judge Lamberth observed, "the mere fact that certain information is not in the record does not alone suggest that the record is incomplete." Id. In short, contrary to Tafas's carefully selected quotations, Amfac Resorts, not only provides no support for Tafas's position, but is fully consistent with both Magistrate Judge Jones' decision and this Court's Memorandum Opinion.

Finally, Tafas repeats the argument he made before Magistrate Judge Jones that Federal Rule of Civil Procedure 26(b)(5)(A) requires a privilege log, but Tafas still simply does not appreciate the distinctive nature of an APA case. Rule 26(b)(5) states that it applies "[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged." Fed. R. Civ. P. 26(b)(5) (emphases added). The rule is thus inapplicable to APA cases for two reasons. First, the documents that the USPTO has excluded from the administrative record are not "otherwise discoverable" under Rule 26(b)(5) because discovery generally is not allowed in APA cases and Tafas failed to show that any exceptions justifying discovery apply in this case.[5] See Fort Sumter Tours, Inc. v. Babbitt, 66 F.3d 1324, 1336 (4th Cir. 1995) (citing, inter alia, Camp v. Pitts, 411 U.S. 138, 142 (1973)). Second, as the USPTO has repeatedly explained, it is not just claiming that the withheld documents are privileged; they also do not belong in the administrative record. See also Defs. Mem. in Opp. to Pls. Requests for a Privilege Log on the Admin. Record, Dkt. No. 74, at 2-4.

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[5] Tafas repeatedly suggests that the Court's decision will essentially give agencies a blank check in their designation of the administrative record. It will have no such effect. This Court properly recognizes in its decision that a plaintiff may obtain discovery if, *inter alia,* it puts forth clear evidence that rebuts the presumption that an agency has properly designated the administrative record. See Tafas, 2008 WL 112043, at *5. Tafas simply failed to make the requisite showing. Id. at *9.

For all of these reasons, Tafas has not come close to demonstrating that this Court made "manifest errors of law or fact," Publishers Res., 762 F.2d at 561, in determining that Magistrate Judge Jones's refusal to require production of a privilege log was not "clearly erroneous or contrary to law," Tafas, 2008 WL 112043, at *2.

C. The Court Properly Concluded that Tafas Failed to Make a Substantial Showing that the Record Was Incomplete

In "Point II" of his memorandum, Tafas argues that he is "not speculating that the administrative record is incomplete" because "[t]he USPTO has confirmed that it is withholding hundreds or thousands of such documents and that they need not be produced because they are 'deliberative materials.'" Tafas Mem. at 26. Tafas again misses the point. In order to justify discovery by showing that the record was incomplete, Tafas needed to show that something was missing from the record that actually belonged there. For the reasons discussed above, deliberative materials do not belong in the administrative record, and their absence thus could not demonstrate incompleteness. Tafas otherwise points to PowerPoint presentations made to the public that he admits were "not physically presented or handed up the [sic] Magistrate Judge Jones." Tafas Mem. at 27. These materials thus were not properly before this Court and do not represent evidence that was previously unavailable to Tafas. Id. at 27. In short, Tafas has given the Court no reason to disturb its holding that Magistrate Judge Jones's decision to deny discovery outside the administrative record was not "clearly erroneous or contrary to law." Tafas, 2008 WL 112043, at *9.

D. The Court Correctly Required Tafas to Make a Substantial Showing to Rebut the Presumption that the Administrative Record Was Properly Constituted

Tafas argues that the Court erred in requiring him to make a "strong showing" of bad faith or incompleteness of the administrative record in order to justify discovery because it held him to the standard required in an adjudicatory setting rather than a rulemaking. Tafas Mem. at 27-29; see Tafas, 2008 WL 112043, at *7 (holding that "Tafas has not made a sufficiently strong or substantial showing of incompleteness to overcome the presumption that the USPTO properly designated the administrative record"). But Tafas cites no authority – much less controlling authority – showing that a lesser or different standard applies in the rulemaking context. Indeed, Tafas does not even explain what standard he believes properly applies to this case, nor did he suggest that any other standard applied in his initial Objections to this Court. He accordingly has given this Court no basis to conclude that it committed a "manifest error[] of law." Publishers Res., Inc., 762 F.2d at 561.

Moreover, even assuming *arguendo* that it would have been enough for Tafas to make something less than a "strong showing," he failed even at that lesser task. For the reasons this Court discussed at length, Tafas simply did not succeed in rebutting the presumption that the administrative record is complete. See Tafas, 2008 WL 112043, at *6-7. Indeed, the USPTO countered each and every one of Tafas's attempts to show that particular categories of documents were missing or that there was evidence of bad faith. See id., at *6 (stating, as to the claim that documents created before the Proposed Rules were published were missing, that Tafas "is reduced to theorizing that the documents may exist, which fails to overcome the presumption that the record is incomplete"); id. (explaining that many documents Tafas claimed were missing were "prime examples of deliberative materials that are immaterial as a matter of law and need not be included in the administrative record"); id. at *7 ("The USPTO also demonstrates that much of what Tafas contends is missing from the record is in fact included in it."); id. at *9 (finding Tafas's claims of discrepancies "woefully inadequate to justify going outside the administrative record," and finding that "[t]he same can be said for Tafas's other bad faith arguments") (internal quotation marks omitted). Tafas has not shown any of these findings by the Court to be incorrect. Accordingly, the Court's Memorandum Opinion must stand.

CONCLUSION

For the foregoing reasons, the Court should deny Tafas's Motion for Reconsideration as moot and/or failing to meet the rigorous burden for reconsideration. The parties' summary judgment motions will be fully briefed by the close of today, and two dozen *amicus* briefs have been filed. It is time for the Court and the parties to turn to the merits.

Respectfully submitted,

CHUCK ROSENBERG
UNITED STATES ATTORNEY

By: /s/

LAUREN A. WETZLER
RALPH ANDREW PRICE JR.
R. JOSEPH SHER
Assistant United States Attorneys
Attorneys for All Defendants
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3752
Fax: (703) 299-3983
Lauren.Wetzler@usdoj.gov

OF COUNSEL:
James A. Toupin
General Counsel

Stephen Walsh
Acting Deputy General Counsel
and Solicitor

William Covey
Deputy General Counsel

William G. Jenks
Janet A. Gongola
William LaMarca
Associate Solicitors

Jennifer M. McDowell
Associate Counsel

United States Patent and Trademark Office

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2008, I electronically filed the foregoing, with attachments, with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Joseph Dale Wilson, III
Kelley Drye & Warren LLP
Washington Harbour
3050 K Street NW
Suite 400
Washington, DC 20007
Email: jwilson@kelleydrye.com

Joanna Elizabeth Baden-Mayer
Collier Shannon & Scott PLLC
3050 K St NW
Suite 400
Washington, DC 20007-5108
E-mail: jbaden-mayer@kelleydrye.com

Counsel for Plaintiff Triantafyllos Tafas, 1:07cv846

Elizabeth Marie Locke
Kirkland & Ellis LLP
655 15th St NW
Suite 1200
Washington, DC 20005
Email: elocke@kirkland.com

Craig Crandell Reilly
Richard McGettigan Reilly & West PC
1725 Duke St
Suite 600
Alexandria, VA 22314
Email: craig.reilly@rmrwlaw.com

Daniel Sean Trainor
Kirkland & Ellis LLP
655 15th St NW
Suite 1200
Washington, DC 20005
Email: dtrainor@kirkland.com

Counsel for Plaintiffs SmithKline Beecham Corp. d/b/a GlaxoSmithKline, SmithKline Beecham PLC, and Glaxo Group Limited, d/b/a GlaxoSmithKline, 1:07cv1008

Thomas J. O'Brien
Morgan, Lewis & Bockius
1111 Pennsylvania Ave, NW
Washington, DC 20004
Email: to'brien@morganlewis.com

Counsel for Amicus American Intellectual Property Lawyers Association

Dawn-Marie Bey
Kilpatrick Stockton LLP
700 13th St NW
Suite 800
Washington, DC 20005
Email: dbey@kslaw.com

Counsel for Amicus Hexas, LLC, The Roskamp Institute, Tikvah Therapeutics, Inc.

James Murphy Dowd
Wilmer Cutler Pickering Hale & Dorr LLP
1455 Pennsylvania Ave NW
Washington, DC 20004
Email: james.dowd@wilmerhale.com

Counsel for Amicus Pharmaceutical Research and Manufacturers of America

Randall Karl Miller
Arnold & Porter LLP
1600 Tysons Blvd
Suite 900
McLean, VA 22102
Email: randall_miller@aporter.com

Counsel for Amicus Biotechnology Industry Organization

Rebecca M. Carr
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037
Rebecca.carr@pillsburylaw.com

Scott J. Pivnick
Pillsbury Winthrop Shaw Pittman
1650 Tysons Boulevard
McLean, Virginia 22102-4856
Scott.pivnick@pillsburylaw.com

Counsel for Amicus Elan Pharmaceuticals, Inc.

Charles Gorenstein
Birch Stewart Kolasch & Birch LLP
8110 Gatehouse Rd.
P.O. Box 747
Falls Church, VA 22040-0747
cg@bskb.com

Counsel for Amicus Intellectual Property Institute of William Mitchell College of Law

Craig James Franco
Odin Feldman & Pittleman PC
9302 Lee Highway
Suite 1100
Fairfax, VA 22031
craig.franco@ofplaw.com

Counsel for Amicus Polestar Capital Associates, LLC and Norseman Group, LLC

Robert Emmett Scully, Jr.
Stites & Harbison, PLLC
1199 North Fairfax St.
Suite 900
Alexandria, VA 22314
rscully@stites.com

Counsel for Amicus Human Genome Sciences, Inc.

Matthew Christian Schruers
Morrison & Foerster
2000 Pennsylvania Ave NW
Suite 5500
Washington, DC 20006-1888
Mschruers@ccianet.org

Counsel for Amicus Public Patent Foundation, et al.

Kenneth Carrington Bass, III
Sterne, Kessler, Goldstein & Fox
1100 New York Ave NW
Suite 600
Washington, DC 20005
kbass@skgf.com

Mark Fox Evens
Thelen, Reid & Priest, LLP
701 Eighth St NW
5th Floor
Washington, DC 20001-3721
mevens@skgf.com

Counsel for Amicus AmberWave Systems Corporation, et al.

Jackson David Toof
Robins Kaplan Miller & Ciresi LLP
1875 Eye St NW
Suite 300
Washington, DC 20006-1307
toof.jackson@arentfox.com

Counsel for Interested Party Anchor Wall Systems, Inc., et al.

Robert Christian Bertin
Swidler Berlin LLP
3000 K St NW
Suite 300
Washington, DC 20007-5116
r.bertin@bingham.com

Counsel for Amicus Bar Association of the District of Columbia

Robert C. Gill
Saul Ewing LLP
2600 Virginia Ave NW
Suite 1000
Washington, DC 20037
rgill@saul.com

Counsel for Amicus BioAdvance, et al.

Jonathan Dyste Link
Townsend and Townsend and Crew LLP
1301 K St NW
9th Floor, East Tower
Washington, DC 20005
jlink@townsend.com

Counsel for Amicus CFPH, LLC

John C. Maginnis, III
1350 Connecticut Ave NW
Suite 301
Washington, DC 20036
maginnislaw2@verizon.net

Counsel for Amicus CropLife America

Timothy A. Molino
Bingham McCutchen LLP
2020 K St NW
Washington, DC 20006
timothy.molino@bingham.com

Counsel for Amicus Federation Internationale Des Conseils En Proprit Industrielle

Maurice Francis Mullins
Spotts Fain PC
411 E Franklin St
Suite 600
PO Box 1555
Richmond, VA 23218-1555
cmullins@spottsfain.com

Counsel for Interested Party Intel Corporation

Blair Elizabeth Taylor
Covington & Burling
1201 Pennsylvania Ave NW
Washington, DC 20004-7566
btaylor@cov.com

Counsel for Amicus Intellectual Property Owner Association

Maurice Francis Mullins
Spotts Fain PC
411 E Franklin St
Suite 600
PO Box 1555
Richmond, VA 23218-1555
cmullins@spottsfain.com

Counsel for Amicus Micron Technology, Inc.

David Wayne Long
Howrey Simon Arnold & White LLP
1299 Pennsylvania Ave NW
Washington, DC 20004
longd@howrey.com

Counsel for Amicus Teles AG Informationstechnologien

Kevin Michael Henry
Sidley Austin Brown & Wood LLP
1501 K St NW
Washington, DC 20005
khenry@sidley.com

Counsel for Amicus Washington Legal Foundation

I have also caused copies of the foregoing to be sent to the following non-ECF users by first-class mail (where an address has been provided to the Court) or electronic mail (where it has not been):

Jennifer Sue Martinez
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305

Counsel for Amicus Intellectual Property and Administrative Law and Public Health Professors

Ron D. Katznelson
Encinitas, CA
rkatznelson@roadrunner.com
Amicus Curiae Pro Se

Robert Lelkes
Geigenbergerstr. 3
81477 Munich
Germany
Amicus Curiae Pro Se

/s/
LAUREN A. WETZLER
Assistant United States Attorney
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3752
Fax: (702) 299-3983
Lauren.Wetzler@usdoj.gov
Counsel for All Defendants